# No. 14,089

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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MICHAEL CAMPODONICO,
*Appellant,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

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## APPELLANT'S OPENING BRIEF.

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**A STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THE DISTRICT COURT HAD JURISDICTION AND THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.**

This is an appeal from a judgment against the appellant in the District Court of the United States for the Northern District of California, sitting without a jury, finding the appellant guilty of violations of 26 U.S.C.A., Section 145(b) (Income Tax Evasion). The charges are in one indictment containing five counts.

The first count charges that "on or about the 9th day of January, 1947, in the Northern District of

California, Northern Division, Michael Campodonico, late of Stockton, California, who during the calendar year 1946 was married, did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of California at San Francisco, California, a false and fraudulent joint income tax return on behalf of himself and his wife, wherein it was stated that their net income for said calendar year was the sum of $3,814.81 (R. Tr. p. 3, line 15) and that the amount of tax due and owing thereon was the sum of $369.00 (R. Tr. p. 3, line 17), whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of $30,720.67 (R. Tr. p. 4, line 2), upon which said net income there was owing to the United States of America an income tax of $12,099.98." (R. Tr. p. 4, line 5).

The second count pleaded in essentially the same language the same offense for the calendar year 1947, except that a separate income tax return was filed by the appellant, computed on the community property basis, wherein his declared income alleged was $3,040.44 (R. Tr. p. 4, line 20), the declared tax he owed was $327.00 (R. Tr. p. 4, line 22), whereas the claimed income was $11,156.42 (R. Tr. p. 4, line 25), and the claimed income tax was $2,564.47 (R. Tr. p. 4, line 27).

The third count pleaded in the same language the same offense for the same calendar year 1947, which he filed on behalf of his wife, computed on a community property basis, wherein he declared her income was $3,040.45 (R. Tr. p. 5, line 14), and the declared tax she owed was $427.00 (R. Tr. p. 5, line 16), whereas the claimed income of appellant's wife was $11,156.43 (R. Tr. p. 5, line 19), and the claimed income tax thereon was $2,744.97 (R. Tr. p. 5, line 21).

The fourth count pleaded in essentially the same language as count one (supra) the same offense for the calendar year 1948, the declared net income alleged was $3,395.43 (R. Tr. p. 6, line 6), the declared tax $205.00 (R. Tr. p. 6, line 8), and the claimed actual income was $5,667.38 (R. Tr. p. 6, line 10), and the claimed tax was $693.52 (R. Tr. p. 6, line 12).

The fifth count was pleaded in the same language for the calendar year 1949, as counts one and four, the declared net income alleged was $4,617.05 (R. Tr. p. 6, line 30), the declared tax $392.00 (R. Tr. p. 6, line 31), and the claimed actual income was $19,190.78 (R. Tr. p. 7, line 1), and the claimed income tax due thereon $5,167.94 (R. Tr. p. 7, line 4).

Upon conclusion of the case of the prosecution, appellant moved the Court for a judgment of acquittal upon the grounds of the insufficiency of the evidence, principally a failure to establish the corpus delicti save and except by extrajudicial statements of the appellant, and an improper application of the so-

called "net worth expenditure" method of proving income tax evasion.

On June 13, 1953, the Court made and entered a judgment under and by which the appellant was found guilty of each of the five counts as charged in the indictment and the pronouncement of judgment was deferred by the Court for the probation officer's presentence investigation.

Before the pronouncement of judgment, and within the time allowed by law, the appellant with leave of Court, filed a motion in arrest of judgment, which after oral argument was denied.

Within the time allowed by law, the appellant moved the Court for a judgment of acquittal and for a new trial upon the grounds now urged on this appeal and others. The motions were all denied except as follows and the appellant received the following sentences:

As to count one, appellant was sentenced to serve eighteen months in a federal prison and fined $5,000.00.

As to count two, no fine was imposed, but appellant was sentenced to serve eighteen months in a federal prison, and the term of imprisonment as to counts one and two run concurrently;

As to count three, no sentence at all was imposed; and

As to counts four and five, the Court granted the motion for acquittal of appellant.

The motion for a new trial as to counts one, two and three were denied.

The United States District Court for the Northern District of California had jurisdiction under the provisions of 26 U.S.C., Section 145(b), and 18 U.S.C., Section 3231.

The United States Court of Appeals for the Ninth Circuit has jurisdiction for this appeal under the provisions of 28 U.S.C.A., Section 1291.

Appellant duly filed his notice of appeal from the foregoing judgment against him within the time prescribed by law; thereafter, and within the time prescribed by law, appellant filed and served his designation of the record to be sent up on appeal, and thereafter, and within the time prescribed by law, appellant filed and served a statement of points upon which appellant intends to rely on appeal.

Thereafter, and within the time prescribed by law, and by order of the United States District Court, the record in this case, including the transcript of all testimony and all exhibits separately and directly certified, was filed with the clerk of this Court, together with a statement of points to be relied upon on appeal.

## STATEMENT OF THE CASE PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

As stated above, the appellant was convicted of income tax evasion, in that he willfully and knowingly filed false and fraudulent income tax returns in each of the years 1947, 1948, and 1949.

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### THEORY OF THE PROSECUTION.

The prosecution contended that the appellant was a gambler during all of the years covered in the indictment; that during these years (1946-1949), he made large sums of money from gambling which he did not report in his income tax returns, but concealed his wealth because of the illegal operation. (R. Tr. p. 33, lines 1 to 20.)

In order to prove its case, the prosecution called a number of witnesses in an attempt to establish that appellant had certain assets consisting of cash, bonds, real estate, automobiles, boats, and a one-half interest in a liquor store. All of the witnesses called were asked either on direct examination, and/or cross-examination if they had any knowledge of the appellant's gambling winnings, and they all replied they had no such knowledge. They further testified that the appellant did not gamble except in small friendly games.

The prosecution, in order to sustain its theory, then relied entirely on an extrajudicial statement made

to the internal revenue agents, which statement was transcribed and presented to the appellant for his signature. Appellant refused to sign the statement because he advised the agents that it was not the truth. In this statement the appellant stated he had won some money gambling and playing the horses.

As stated above, all of the witnesses called by the prosecution, by their testimony refuted the claim that appellant made any money gambling. Moreover, the internal revenue agents working on the case, in order to corroborate the appellant's statement, made an exhaustive investigation to determine if appellant made any money gambling with negative results.

Then the prosecution, through its agents, attempted to itemize the various expenditures in such a way as to establish that appellant's net worth was substantially increased during each of the years in question.

Upon conclusion of the prosecution's case, appellant moved for a judgment of acquittal upon the grounds hereinabove mentioned. The motion was denied.

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**THEORY OF APPELLANT.**

1. The evidence of both the appellant and the prosecution clearly establishes the fact that the appellant made no money whatsoever from gambling, and that he properly reported all income which he

received from wages and from his one-half interest in a liquor store during the years in question.

2. The evidence of the appellant and the appellee clearly shows that appellant had accumulated a substantial amount of cash prior to the years in question, which was not taken into account by the agents of the Bureau of Internal Revenue called by the appellee to establish a proper beginning net worth.

3. The appellant did not show any substantial understatement of his income for any one of the years in question.

4. That the prosecution could not rely entirely and solely on an extrajudicial statement of appellant upon which to predicate a conviction in view of the appellant's refusal to sign the statement "because it was not the truth", especially so in view of the testimony of the witnesses called by appellee, refuting the incriminating statements in the unsigned statement.

5. The case at bar is not a proper case in which to apply the net worth theory as it did not clearly and accurately establish by competent evidence the net worth of the appellant for any one of the tax years in question, nor did it produce evidence that excluded all possible sources of taxable income from which any increase of net worth and the excess expenditures could have been derived.

6. The Government failed to establish by competent evidence with reasonable certainty pertinent starting items of the net worth statement, particularly the cash on hand on January 1, 1946.

**SPECIFICATION OF ERRORS.**

The appellant makes the following specifications of errors and states the following points upon which he intends to rely on the appeal:

1. The trial Court erred in denying appellant's motion in arrest of judgment upon the grounds that the Court had lost jurisdiction to pronounce judgment therein in that the appellant had been denied a speedy trial in violation of the Sixth Amendment to the Constitution of the United States.

2. The Court erred in denying appellant's motion for acquittal made at the conclusion of the evidence.

3. The findings and decisions of the Court are contrary to the weight of the evidence.

4. The findings and decisions of the Court are not supported by substantial evidence.

5. The Court erred in admitting the alleged statement of the appellant (Exhibit No. 7) to be introduced in evidence.

6. The Court erred in denying appellant's motion to strike from the record Exhibit No. 7, which purports to be an alleged statement of the appellant which was introduced in evidence.

7. The Court erred in denying the appellant's motion for a new trial.

8. The Court erred in overruling objections by appellant to questions addressed by appellee's attorneys to witnesses, which questions related to the extra-

judicial admissions claimed to have been made by the appellant and which were asked and answered without any proof (other than such purported admissions) that a crime had been committed either before or after such questions were asked and answered.

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**QUESTIONS PRESENTED IN THIS CASE.**

1. Was the appellee, on the facts of this case, entitled to rely upon proof of income by the net-worth increase-expenditure method?

2. Assuming that appellee had a right to rely on this method of proving income tax evasion, did the appellee prove with reasonable certainty the appellant's net worth on December 31, 1945?

3. Can a conviction be sustained on the net-worth expenditure method where there is *absolutely no* evidence as to source of income and where there is a total lack of evidence of a lucrative business or calling?

4. Can a conviction of income tax evasion be sustained in a case where the prosecution proves only expenditures by a taxpayer in the light of testimony which conclusively proves the prior affluence of the appellant?

5. Are the extrajudicial statements of a defendant subject to a motion to strike if the prosecution fails to corroborate the parts relied upon therein for a conviction?

6. In a case which involves only two and one-half days of testimony, is not fourteen months between the start of the trial and the pronouncement of judgment a denial of a defendant's right to a speedy trial in violation of the Sixth Amendment to the United States Constitution, and should not the defendant's motion in arrest of judgment be granted in a situation surrounding these facts?

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**STATEMENT OF FACTS.**

At the outset of the trial of this case, the prosecution announced that it intended to "proceed on the basis of the net worth in so far as income is concerned." (R. Tr. p. 31, lines 20-24.)

> "Mr. Maxwell. Then the Government will show a large increase in net worth amounting to some $80,000 over the four-year period.
>
> The Court. Four years?
>
> Mr. Maxwell. Yes. I think it was $84,000. And also the income was not reported on the income tax returns, and that it was not reported, with wilful intent to evade taxes, and that the principal source of this income was gambling winnings.
>
> The Court. Gambling winnings?
>
> Mr. Maxwell. Gambling winnings, yes, sir.
>
> The Court. Is there going to be any contention there was an attempt to cover up because of an illegal operation of some kind?
>
> Mr. Maxwell. Yes, your Honor, there will be that contention, particularly that the defendant dealt in cash throughout, did not maintain any

bank account except one account (5) which was concerned with the collection of monies on a deed of trust which he owned."

(R. Tr. p. 33, lines 1-20.)

In order to substantiate this contention, the prosecution first offered into evidence, without objection, the income tax returns for the years 1946 to 1949 to show what taxes had been paid by the appellant.

The appellant and appellee then stipulated that if certain witnesses were called they would testify as to expenditures made by the appellant during the years in question, subject to a motion to strike upon all the legal grounds, including the failure of the prosecution to prove a net worth case in accordance with the principles of law. This evidence was introduced immediately after the income tax returns had been received in evidence over the objection of the appellant upon the grounds that the expenditures are not admissible until a beginning net worth and source of income has been established. The Court permitted this evidence subject to a motion to strike. (R. Tr. p. 43, lines 4-32.) Testimony was admitted showing large expenditures by the appellant. At the conclusion of the prosecution's case, the motion to strike was renewed and denied by the Court.

In order to prove its case on this theory, the prosecution called six witnesses, by whose testimony the essential elements of the offenses set out in the indictment were sought to be established. Their testimony, although in parts touching upon matters not material

to the issues, falls utterly short of proving the offenses with which appellant is charged. As a matter of fact, the material part of their testimony proves the innocence of the appellant.

First witness: Rosario Mandalari.

Q. Mr. Mandalari, do you know the defendant in this case?

A. I do.

Q. How long have you known him?

A. Well, since 1938.

Q. Since 1938. And during that time he has lived in Stockton, (40) California?

(R. Tr. p. 65, lines 5-10.)

Q. (By Mr. Boscoe.) Let me ask you this: How did it happen that you went to him for this $20,000, Mr. Mandalari?

A. Well, we went hunting and fishing all the time together, and I know he has got money; he told me he had money.

Q. You knew he always had money, is that correct?

A. *Since I know him, yes.*

Q. And when you say you were socially acquainted with him, you gambled with him, did you mean to convey to the Court that he gambled for any stakes approximating any of the figures that the Government has given here?

A. That is right, I played pan and pinochle, that is all.

Q. Can you remember one game in 1946, '47, '48 or '49 in which Mr. Campodonico won any money from you? One game; just one game?

A. No.

Q. You cannot?

A. No.

Q. You have been playing with him since 1938, is that correct? (47). Did you ever see him win any money in 1946, '47, '48 or '49?

A. I saw him probably win $2 in a pan game, or $5 pan game.

Q. When? What year?

A. I don't know what year.

Q. You don't even know if it was '46, '47, '48 or '49?

A. That's right, I couldn't.

Q. Could it have been in prior years?

A. I couldn't say, that is right, I couldn't say.

(R. Tr. p. 70, lines 23-32; p. 71, lines 1-22.)

Second witness: Eva M. McNabb.

Q. Mrs. McNabb, you made out Mr. Campodonico's income tax for the years that you have testified to. You did it from a W-2, is that correct?

A. Yes, this thing here (exhibiting).

Q. And you also kept the records and the books of the establishment where you worked, is that correct?

A. Well, yes, records were brought to me, Mr.——

Q. You knew that he was carried in that establishment as an employee, is that correct?

A. Yes, sir.

Q. And you knew he had a social security number; right?

A. Yes.

Q. You didn't mean to testify here that Mr. Campodonico was engaged in gambling in this establishment, did you?

A. I didn't say that.

Q. I mean, it is your testimony that you don't know whether Mr. Campodonico engaged in any gambling whatsoever, at this establishment?

A. I said he was employed there.

Q. He was employed?

A. Yes.

(R. Tr. p. 86, lines 21-31; p. 87, lines 1-13.)

Third witness: Joe Gianelli, testified that he was the manager of the Union Club, a gambling establishment where appellant was employed as a floor man and bouncer:

A. What was your employment? What was your occupation in the year 1946 and the first part of 1947, Mr. Gianelli?

A. I was working for Mr. Hill.

Q. And in what capacity, sir?

A. I was the manager there.

Q. You were the manager?

A. Of the club.

Q. Of the club?

A. The clubroom, the 33 Club, the Union Club.

(R. Tr. p. 90, lines 16-25.)

Q. Was Mr. Campodonico an employee of the club at that time?

A. Yes, he was, sir.

Q. When was he employed, sir?

A. I don't remember just which year he went to work there. It was the latter part of the years of the forties, but before 1946. It would have been 1943 or 1944.

Q. When did his occupation or employment terminate?

A. The first part of 1947.

Q. Do you remember what month?

A. I think it was May.

Q. What was the occasion for that?

A. Well, the thing got closed, the town was closed.

Q. Now, what activities went on—strike that. What was Mr. Campodonico's job at the club, sir?

A. Well, he was sort of a floor man, bouncer and took care of the games when I wasn't there.

(R. Tr. p. 91, lines 8-25.)

This witness also gave the following testimony:

Q. During this period that you have known him, Mr. Gianelli, Mr. Campodonico—thirty years, is that your testimony? You have been close with him for that period of time?

A. Fairly close, yes.

Q. Pardon me?

A. Yes.

Q. And during that period of thirty years have you ever known Mike Campodonico to do any gambling?

A. No, I never knew him as a gambler. I knew him to play games, but not as a gambler in the gambling sense.

(R. Tr. p. 96, lines 21-32.)

Q. And you were working for Mr. Hill as his employee, is that correct?

A. Correct.

Q. Mr. Campodonico was working under your supervision?

A. Yes.

Q. And you were kept constantly informed as to the business of the establishment, is that correct?

A. Yes, I would say so.

Q. And did you have any rule or policy in this establishment as to whether or not an employee could engage in gambling?

A. They could not gamble in there, no.

Q. That was one of the rules of that establishment?

The Court. Just a moment, I want to see if I understand you clearly. Doesn't the house have dealers in the game?

The Witness. The house had dealers, but none of the dealers could gamble in their place.

The Court. Strictly banking games.

The Witness. Not allowed in their off hours, they were not allowed to gamble in our place.

The Court. I see. All right. Proceed.

Q. (By Mr. Boscoe.) Mr. Campodonico wasn't even a dealer, was he?

A. No.

Q. All he did was handle the money from the safe to the games, is that correct?

A. That is correct.

(R. Tr. p. 97, lines 2-28.)

Fourth witness: Chester R. Taynton, an agent of the Bureau of Internal Revenue.

Q. In your investigation, you testified that you ascertained what Mr. Campodonico's occupation was?

A. Yes.

Q. You did that by consulting the police officers, correct?

A. Yes.

The Court. Is that all you consulted?

The Witness. Oh, no. I consulted other people.

Q. (By Mr. Boscoe.) And did you ascertain that at any time in his occupation as a gambler, he won any substantial sum of money?

A. No.

(R. Tr. p. 187, lines 29-31; p. 188, lines 2-9.)

The Court. I wanted to ask one question, about this question concerning gambling. What period of time did you conduct the investigation to determine whether or not any money was won in gambling?

The Witness. I just checked as far as the man's reputation as a gambler was concerned. I called at the police department and I asked the then chief——

The Court. This was when?

The Witness. This was in 1950.

The Court. Yes.

The Witness. Pardon me. In 1949.

The Court. Yes.

The Witness. And I asked him if he could give me any information on Mike Campodonico, and he said, "Mike Campodonico, oh, yes—a pimp and a gambler."

The Court. Well, you answered the question that you did not ascertain Mr. Campodonico won any substantial sums of money gambling?

The Witness. That is right.

The Court. The question I am asking you is, what period of time did that investigation cover?

The Witness. My investigation?

The Court. Yes. Over what period of time did you ascertain that he didn't win any substantial sum of money gambling?

The Witness. I answered that incorrectly. I didn't ascertain that he didn't win any. I didn't ascertain that he did.

The Court. You didn't ascertain that he did win any?

The Witness. No.

The Court. But that was over the whole period involved, 1943——

The Witness. I know of no one who can tell us he lost money.

The Court. That he won any substantial sum of money gambling?

The Witness. No.

The Court. From the period since '43, or prior to '43?

The Witness. For any period.

The Court. Any period. All right. All right, Mr. Maxwell.

Redirect Examination.

By Mr. Maxwell:

Q. Now, Mr. Taynton, in connection with the last question, did you make an investigation to attempt to determine these items, in other words, to attempt to determine any specific substantial money that the defendant got from gambling?

A. No.

Q. Did you attempt—did you contact various individuals in order to determine whether Mr. Campodonico won on any specific occasions substantial sums from gambling?

A. No.

Q. You did not?
A. No.
(R. Tr. p. 188, lines 16-32; p. 189, lines 2-32; p. 190, lines 2-10.)

Fifth witness: Wareham Seaman, a tax attorney, who represented the appellant and advised him to make a statement to the revenue agents (Exhibit No. 7). Incidentally, Exhibit No. 7, an extrajudicial statement of appellant entirely lacking in corroboration, is the only evidence in this record that appellant won any substantial sum in gambling, which statement the appellant refused to sign because it was not the truth.

The testimony of all the foregoing witnesses and of Wareham Seaman is directly contrary to the announced offer of proof of the prosecution:

Q. When did you first hear about embezzlement, the possibility that the defendant might—alleged that he embezzled money?
A. Oh, I presume a week or ten days after May 4.
Q. I see. And who brought the subject up?
A. Well, it wasn't anyone that brought the subject up. It was a rationalizing on my own that——
Q. In other words, you originated the idea?
A. That is right, and I made inquiry from that; it harked back to a previous conversation that I had had with him and with Mrs. McNabb.
Q. With Mrs. McNabb?
A. Right.
(R. Tr. p. 159, lines 7-19.)

A. The time and place would be, I believe, about the latter part of March in 1950 in my office, and we were discussing the fact that I wanted all the information that was available, I wanted him to tell me everything so that I could help him the greatest. And——

Q. I see.

A. ——Mrs. McNabb concurred in that thought and said that "Never lie to your doctor or your attorney," and she said it makes no difference where you get the money—she named several sources, and mentioned "even if you had stolen it." And, of course, I was keeping my eye on Mr. Campodonico, and that seemed to hit a tender spot, and I had made some inquiries that led me to believe that he might have embezzled that money. I wasn't certain of it and I questioned him on it, and finally he admitted that he had embezzled it.

Q. In your questioning of him did you suggest that if he had embezzled the money, that it might be a defense to a criminal tax prosecution?

A. No. I was more particularly interested in getting from him an admission that he had embezzled it.

(R. Tr. p. 159, lines 31-32; p. 160, lines 2-23.)

Q. And was there any reference in the conversations that he had with you in reference to having made this money gambling at any time?

A. Well, he admitted that he gambled in the past.

Q. In the past?

A. Yes.

Q. Prior to '43?

A. Right, uh-huh.

Q. You say you made inquiries to determine if he had embezzled some money. You weren't satisfied in your mind that Mr. Campodonico had made this money gambling, isn't that correct?

A. That's right.

Q. That is right. And these inquiries that you made were independent of any conversation that you had with Mr. Campodonico?

A. Yes.

Q. He led you to believe that the funds had been embezzled, is that correct?

A. That is right.

Q. It was your belief in urging that upon the Government that in fact the funds had been embezzled?

(R. Tr. p. 161, lines 30-32; p. 162, lines 2-19.)

A. That's right.

(R. Tr. p. 162, line 31.)

The sixth witness, called by the prosecution, was Shirley S. Atkin, the investigating agent for the Fraud Section of the Bureau of Internal Revenue:

A. I doubt if I asked Mr. Candelario about Mike's gambling activities. It was on another matter that I questioned Mr. Candelario on.

Q. Well, the Government in this case is basing its case on the fact that the increase in net worth was due to large gambling winnings or in gambling winnings. I will ask you, as a result of your investigation did you find any gambling winnings that this man made?

A. No.

Q. As a matter of fact, you found out that he did not gamble at all, is that correct, except, for

instance, friendly games that you are calling pinochle?

A. That is the result of my investigation, yes.

(R. Tr. p. 258, lines 12-25.)

Q. (By Mr. Boscoe.) Let me ask you: You went to the police department and inquired of various persons there as to how Mr. Campodonico made his money, didn't you?

A. Yes.

Q. They didn't tell you he made any gambling, did they?

A. No.

Q. No one in the police department told you that Mr. Campodonico was a gambler, is that correct? That is, that he made any money gambling?

A. They did use that term in describing Mr. Campodonico, together with other terms.

Q. They told you that—all persons you interviewed regarding Mr. Campodonico's occupation told you merely that he was working in a gambling house and that Mike wasn't a gambler, isn't that correct?

A. Well, they didn't specifically state that he wasn't a gambler, no. No, they said that he had the reputation of being a gambler; that is, in prior years.

(R. Tr. p. 259, lines 24-32; p. 260, lines 2-11.)

The extrajudicial statement (Exhibit No. 7) was offered and received in evidence over the objection of appellant. (R. Tr. p. 165, lines 30-32.)

This statement is the only evidence in the record that appellant made any substantial money in gam-

bling. It is pointed out that appellant would not sign this statement because it was not the truth. The only portion of the statement which the government relied on for conviction is that part where appellant said he won money gambling.

The testimony of every government witness not only fails to corroborate the statement, but is directly contrary to the contents therein insofar as gambling winnings are concerned.

It is submitted that the statement contained evidence showing that appellant since 1925 to 1943 had been engaged in lucrative callings, yet the appellant was not given the credit for affluence in the years before 1943.

The appellant, in the face of the total lack of evidence showing unreported income during the years in question, did not testify in his behalf on the advice of his counsel.

The prosecution and appellant stipulated, however, that appellant and/or his wife had, in their proper names, safe deposit boxes in the Bank of America (Main Branch) at Stockton, California, four safety deposit boxes dating back to 1936, and that in the year 1943, appellant and his wife had not one, but two of said boxes. (R. Tr. p. 299, lines 20-31 and p. 300, lines 1-13.)

A further stipulation was also entered into which reveals that on September 3, 1942, appellant owned a Hunter Cruiser, which appellant sold for $2,000.

In view of the fact that appellant could show these facts, together with the following:

1. Rosario Mandalari purchased a rooming house owned by appellant for $1700 in 1938. (R. Tr. p. 70, lines 5-17.)

2. That prior to January 1, 1946, appellant owned rooming houses, which were lucrative enterprises. (R. Tr. p. 289, lines 29-31 and p. 290, lines 1-9.)

3. That appellant paid $3,524.60 to the American Trust Company in Stockton, California, to pay off a loan on a house, which fact was unknown to the investigating agents who calculated appellant's net worth on December 31, 1945. (See Defendant's Exhibit A.) (R. Tr. p. 193, line 31; p. 194, lines 1-7.)

4. That in the 5th month of the year 1946, appellant paid in cash the sum of $22,500 for the purchase of a house, certainly raises an inference that appellant had cash on hand, which was not taken into account, on January 1, 1946. (R. Tr. p. 270, lines 6-18.)

It is submitted that the beginning net worth adopted by the prosecution is not only lacking in reasonableness, but a mere guess and utterly unfair and unjust.

**THE MOTION IN ARREST OF JUDGMENT SHOULD HAVE BEEN GRANTED.**

This trial was commenced in the trial Court on May 13, 1952 at 10:30 A.M. The prosecution rested on May 14, 1952, and following motions to strike testimony and for a judgment of acquittal, the case was continued by the Court to allow briefing of the points of law, five days for appellant to open, five days for appellee to answer, and three days additional for appellant's reply. Briefs were submitted by each side on the motions referred to above and the case was continued on order of the Court, without the consent or approval of appellant, until August 8, 1952, on which date appellee reopened its case for one additional witness, after whose testimony the Court remarked: "I do realize there has been additional evidence by the government here which may *tend to detract and which may make the case weaker, than it was originally.*" (R. Tr. p. 295, lines 14-19), and at the end of the case, the Court again stated: "I understand your argument and I have analyzed these witnesses' testimony, (referring to the prosecution's witnesses on 'no gambling') and I can't say that it improves the Government's situation any, but nevertheless I must rule that the motion for judgment of acquittal must be denied at this time." (R. Tr. p. 298, lines 8-13.)

The attention of the Court of Appeal is particularly invited to this phase of the case in view of the fact that there could not have been more than twelve hours testimony in the entire case. Moreover, the points

involved had been thoroughly briefed by both sides when the Court made these statements.

The trial Court again, without consent or approval of the appellant, continued the case for final argument to September 5, 1952, at which time the case was fully argued by both sides.

Nothing further was heard or done in this case until June 13, 1953, when the Court filed a memorandum opinion adjudging the appellant guilty on each count. The continuance of the case to June 13, 1953 was certainly not with the approval or concurrence of appellant. Thereafter, a further continuance was taken by the Court until July 13, 1953, without the consent or approval of appellant.

It is submitted that this is in violation of the appellant's rights to a speedy trial insured to everyone charged with crime under the Sixth Amendment to the Constitution of the United States.

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**ARGUMENT.**

At the beginning of the trial, counsel for the Government announced that this was a "NET WORTH" case, and that the source of income was from large "GAMBLING WINNINGS", and also that he would show an attempt on the part of the defendant to cover up "PROCEEDS FROM ILLEGAL OPERATIONS".

The issues presented are hereinabove set forth.

No evidence whatsoever was introduced by the Government, tending to show that the defendant failed to report the income he received from:

1. Gambling winnings (except the uncorroborated statement of the defendant which was conclusively established to be untrue insofar as profit from gambling is concerned.)

2. Wages.

3. His partnership interest in the Capitola Liquor Store.

The evidence shows that the property acquired by the appellant was purchased with cash. There is no direct evidence as to the SOURCE from which this cash was obtained, nor any evidence of the date or dates of the acquisition of such cash.

It is submitted that there is no competent evidence of circumstances from which even an inference might be drawn as to the source of the cash acquired by the appellant, which could be considered as taxable income.

As to the presence of any circumstantial evidence from which an inference might be drawn as to the source of this money, the prosecution utterly failed to produce even a scintilla of evidence. The evidence is, however, direct and clear from testimony of the Government's own witnesses, that the *appellant did not gamble* at the Union Club, nor at any other place, during the years involved, and that the wages he received while working at this club, were properly reported, and that the appellant "REPORTED THE

CORRECT PARTNERSHIP INCOME" from the Capitola Liquor Store. (R. Tr. p. 182, lines 9-23.)

So it is that in view of the positive evidence dispelling any inference of gambling winnings by the defendant, there is absolutely no testimony in this case from which this Honorable Court can infer or find that the appellant had one cent of taxable income in the years in question, to-wit: 1946, 1947, 1948 and 1949.

The internal revenue agent, Mr. Taynton, testified that he did not take into consideration the cash which he might have had on hand, and he must have known that the defendant had a large amount of cash on hand, because he had taken a statement from him in which the defendant stated that he had between $45,000.00 and $50,000.00 in cash, plus other assets, prior to 1946. This testimony, which the Government is bound by, is set forth in Government's Exhibit No. 7—The Purported Statement of Defendant, at pages 16, 17 and 18.

One of the main issues in this case on appeal is whether or not the prosecution has established a net worth case. The determination of this fact is all important in the denial of the motion for an acquittal. It is the contention of the appellant that a net worth case has not been established for two reasons, namely:

1. A beginning net worth has not been established; and
2. A lucrative source of income has not been established.

A net worth tax case is essentially founded upon circumstantial evidence, and a tax case is no different from any other case involving circumstantial evidence, so that the rule of elimination of all reasonable hypotheses, except that of guilt, is applicable. Similarly applicable are the rules of evidence with respect to confessions or admissions in the nature of confessions, requiring the establishment of the elements of the crime, or the corpus delicti, before such admissions may be accepted as competent evidence.

**I. A beginning net worth has not been established.**

A beginning net worth is an essential element of a net worth case. The rule is set forth in the leading case of *U. S. v. Chapman,* 168 Fed. 2d 997, as follows:

> "In a net worth case, the starting point must be based upon a solid foundation, and a Revenue Agent's statement of the defendant's oral admission or confession when uncorroborated is not sufficient to convict."

The case at bar is even stronger because appellant in his statement advised the agents he had a great deal of cash on the beginning year, which was totally ignored.

If the rule were otherwise one could be prosecuted for income tax evasion by the mere showing that one has a large amount of cash on hand. Can it be contended that such a person must under these circumstances ALONE be put on proof as to the source of this large amount of cash? Such is not the law.

"The possession of money alone is not sufficient to establish net taxable income. But evidence of the possession of money and the expenditure of money may be considered as part of a chain of circumstances which you may consider in arriving at a conclusion as to whether or not the defendant enjoyed taxable income."

*United States v. Alphonse Capone,* 56 F. 2d 927.

There has been a great deal of recent tax litigation involving the two principles above stated. Of necessity, the facts and circumstances have differed in each case, but a careful study of the reported cases reveals that in all cases where a superficial conflict in the decisions appears, it is the facts and circumstances of each case that are responsible for the apparent conflicts, rather than the underlying principles of law. In other words, the fundamental laws of evidence as stated above have never been held not to be applicable in tax cases.

As to the type and quantum of proof required to establish a beginning net worth, there are recent decisions which might be construed as establishing either a strict or a liberal view of this requirement. The two cases generally cited as advocating the strict view are the *Bryan* and *Fenwick* cases, and the cases cited as advocating the liberal view are the *Bell* and *Brodella* cases, as follows:

*Bryan v. U. S.* (C.C.A. 5, 1949), 175 F. 2d 223, 38 A.F.T.R. 56;

*Fenwick v. U. S.* (C.C.A. 7, 1949), 177 F. 2d 488, 38 A.F.T.R. 810;

*Bell v. U. S.* (C.C.A. 4, 1951), 185 F. 2d 302, 39 A.F.T.R. 1279;

*Brodella v. U. S.* (C.C.A. 6, 1950), 184 F. 2d 823, 39 A.F.T.R. 1096.

It is interesting to note, however, the language of the United States Tax Court, citing and approving the *Bryan* and *Fenwick* cases on October 7, 1953, decided after the decision in the case at bar.

*King Tsak Kwong v. Commissioner,* 12 T.C.M. Docket No. 27,019, C.C.H. Dec. 19, 924 (M).

"In a 'net worth case,' the starting point in the respondent's computation, i.e., his computation of assets, liabilities and net worth at the beginning of the period under question must be sound."

*United States v. Chapman,* 168 Fed. 2d 997, 1001;

*Bryan v. United States,* 175 Fed. 2d 223 (49-1 U.S.T.C. No. 9322), aff'd., 338 U.S. 552, 50-1 U.S.T.C. No. 9140;

*United States v. Fenwick,* 177 Fed. 2d 488, (49-2 U.S.T.C. No. 9448).

In the *Bryan* case the Government proved that the expenditures exceeded the reported gross income. The defendant's net worth as of January 1, 1941, was computed by the Government to be approximately $107,000.00 determined from all known and available sources of information, including the cost of real estate, furniture and fixtures in night clubs and gambling places, and cash in bank. The Government's witness admitted that he did not know whether this

computation contained all of the assets of the defendant or not. This was fatal because as the Court stated:

> "The evidence, being circumstantial, must exclude every reasonable hypothesis other than the guilt of the defendant * * * In view of the auditor's admissions that he was not able to say that his computation included all of the assets of the defendant at the beginning of the period, together with the absence of any admissions, records, financial statements, bookkeeping entries, or other findings, or evidence tending to bind the defendant as to the lack of additional assets at the beginning of the tax period, the evidence * * * was insufficient to make out a prima facie case against the defendant on the net worth-expenditure basis, and the case should not have been submitted to the jury since it did not exclude the hypothesis that the funds used in making some of the expenditures might have been from sources other than current business income."

In the *Fenwick* case there was no direct proof of unreported income. The defendant was a druggist and his prosecution was based upon alleged increases in net worth in excess of that reported for income tax purposes. The beginning net worth for the year 1943 was the issue. On cross-examination, the revenue agent admitted: That he did not ask the defendant whether he had cash on hand accumulated from the earnings of his business; that there was no evidence as to the amount of bonds or stock owned by the defendant at the end of 1942, and no determination

whether any were cashed in 1943 and 1944; that there was no proof of the value of a life insurance policy at the end of 1942, or whether it was surrendered or cashed; that depreciation was not taken into account.

The conviction of the defendant was reversed by the Circuit Court for the reasons as stated:

> "Remembering that the government has the burden of proof in a criminal case, that the burden never shifts to defendant, that circumstantial evidence must be of such character as to exclude every reasonable hypothesis except that of guilt, it necessarily follows that, when the government relies upon circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion, the basic net worth must be established. The defendant is not compelled to take the witness stand; he is not compelled to make proof that he is innocent, but he must be proved guilty by the evidence beyond all reasonable doubt, and *where there is uncertainty as to whether all the assets of defendant are included in the government's computation of net worth, it follows that its computations cannot be relied on.* Essential proof of no other assets is the cornerstone of the evidence of the government; that cornerstone being faulty, the whole edifice is so weakened as to be undependable as proof of guilt beyond all reasonable doubt"

In the *Bell* case the evidence consisted "* * * in part of estimates of the net income of the defendant * * * based upon calculations of his net worth, * * * and also the statements of the defendant to the reve-

nue agents who investigated the case". Bell was an auctioneer and a dealer in art works and antique furniture, and also dealt in real estate and insurance. A net worth statement as of December 31, 1942, was prepared by the revenue agent, which was made available to Bell's accountant. Bell made no claim at the time that he possessed other assets than those shown on the statement, and he offered no evidence at the trial to contradict this beginning net worth statement. The statement prepared by the agent showed that the greatest increase in net worth was in real estate. "The testimony as to the *source of the funds* with which Bell increased real estate holdings has an important bearing upon the sufficiency of the proof to take the case to the jury." When questioned regarding the source of funds with which he purchased three pieces of real estate, Bell told of loans from his mother, and that one purchase was made by his wife, all of which the jury evidently disbelieved. In connection with the purchase of another piece of property, "The net worth statements show no reduction of the other assets or increases of liabilities sufficient to cover the increase in the taxpayer's real estate."

The defendant made the contention that the evidence of net worth was inaccurate and lacking in probative force, and specified certain details. The Court found that, "An examination of the record indicates that the probative force of the evidence * * * is not undermined by these criticisms," and then proceeded to discuss the probative force of the evidence

in the record, and determined, "In short, these criticisms of the basic opening statement, considered separately or together, furnish no ground for its exclusion from the jury. The agent testified that he had found no evidence of intimation of other assets which he failed to include, and his statement was furnished to the defendant's accountant, and was not challenged."

The rulings in the *Bryan* and *Fenwick* cases, supra, were brought to the attention of the Court, to which it replied: "* * * *But we cannot follow these decisions since it is obvious that they are based upon their particular facts and they do not relieve us from the duty of appraising the sufficiency of the evidence in the case before us.*"

The second alleged liberal policy case is that of *Brodella v. U. S.* This case involved an application for bail pending appeal, so that the issue was solely that of the sufficiency of the evidence to take the case to the jury. The Court discussed at length the *Fenwick* and *Bryan* cases, supra, pointing out the difference in the evidence upon which the decisions were based, stating: "* * * *We agree with the general principle of law as stated by those cases. However, it is an entirely different question whether the facts of any particular case bring the rule into play.*" (Emphasis supplied.)

The Court then proceeded to enumerate the evidence in the record to support the finding that it was sufficient to take the case to the jury. This evidence consisted in part, as follows: Defendant told the

agent he had accumulated $140,000.00 in cash, which he later said was in error and should be deleted from the statement. Subsequently, he changed the amount to between $50,000.00 and $60,000.00. This claim was investigated by the agent, but disallowed in his computation, which action the Court approved. There was also evidence that the profits reported from business were not in line with the profits from other businesses of the same type, and that purchases of liquor were omitted from the books.

The Court pointed to specific facts upon which to justify its decision that a satisfactory beginning net worth had been established to distinguish this case from the *Bryan* and *Fenwick* cases.

From the above analyses of the four foregoing cases, of which the *Bryan* and *Fenwick* cases are referred to as strict, and of which the *Bell* and *Brodella* cases are referred to as liberal, it appears that the real distinguishing features consist of facts rather than principles of law. The fundamental principles of law are present in each case. These fundamental principles are aptly set forth in the case of *U. S. v. Chapman* (C.C.A. 7, 1948), 168 F. 2d 997, 36 A.F.T.R. 1176, p. 1180, as follows:

The starting point in a net worth case must be based *upon a solid foundation and a revenue agent's statement of the defendant's oral admission or confession, when uncorroborated, is not sufficient to convict.*

It is apparent that under doctrine of the *Bell* and *Brodella* cases, relied upon by the Government, the

appellant Michael Campodonico's motion for acquittal should have been granted for the following reasons:

1. In the *Bell* case, it was affirmatively proved that Bell was engaged in a lucrative business, to-wit: Dealer in real estate, an auctioneer, and a dealer in furniture, and carried on a business under the fictitious name of Mount Vernon Galleries, and the agent for the Government, who investigated his increase in net worth, testified the defendant had a *Source of Income from which the increase in net worth was derived.*

In the case at bar the revenue agent testified that although he was advised that the appellant was a gambler, he positively stated that his investigation failed to disclose any gambling winnings whatsoever. Moreover, all the witnesses, testifying in behalf of the Government, established the fact, beyond any doubt, that the appellant's increase in net worth was not derived from gambling. Moreover, in the *Bell* case, the agent testified that part of his calculations were based on the defendant's statement, whereas, in the case at bar, the agent ignored entirely the statement of the appellant, which was that he had amounts amounting to $80,000.00 prior to 1946. (Exhibit No. 7, pp. 16, 17 and 18.) Thusly, it is obvious that insofar as beginning net worth and source of income, the *Bell* case, on its facts, does not support the Government's contention in the case at bar.

Similarly, the *Brodella* case is distinguishable from the case at bar on its facts, and the law applicable thereto. In the *Brodella* case, the Government estab-

lished that the defendant was engaged in two businesses, and that the defendant's books failed to disclose purchases of liquor, and the resulting profit from the sale thereof. Moreover, in the *Brodella* case, the revenue agent investigated the taxpayer's statements regarding his cash on hand at the beginning of his net worth period, whereas, in the case at bar, the agent positively testified that he made no investigation of the cash on hand, although he had direct evidence that the appellant had $45,000.00 or $50,000.00 in cash on hand, plus considerable other assets, and arbitrarily assumed that appellant had no cash at all on hand.

It is submitted that it must be obvious to this Court that the appellant had large sums of cash on hand at the end of 1945, in view of the fact established by the Government's witnesses that the defendant's whole record is one of large cash transactions, before and subsequent to December 31, 1945, especially in view of the fact that in the fifth month of 1946, he paid $22,500.00 in cash for a home.

On this point, when the trial Court was wrestling with the problem as to whether the motion for judgment of acquittal should have been granted at the conclusion of the Government's testimony, it made this remark:

> "The Court. But it seems to me that this is a considerable question of law, because, as I see it now, there is a considerable question in my mind as to whether or not—in view of the failure to show where the income came from, other than

that which was reported, and in view of the failure to show that he didn't have another source, didn't have it when he started; the starting point is completely blank of any cash, and this man's whole record is a record of cash transactions——

Mr. Seawell. That is correct.

The Court. ——both before and subsequently. That is a fact to be argued.

Mr. Maxwell. May it please the Court, may I ask one or two questions of the Court?

The Court. Yes.

Mr. Maxwell. In the first instance, as to the matters of net worth that were stipulated, you may recall these transactions were stipulated along with the other media there—in other words, that the purchases and sales were by cash.

The Court. That is right.

Mr. Seawell. But you say there wasn't any cash. The agent, he knew there was a lot of cash.

The Court. In other words, I am raising a query: During this four-year period of cash transactions, or practically all transactions,——

Mr. Seawell. One check, I think.

The Court. He had a couple of short-period encumbrances which he paid off very quickly, so they were practically cash transactions. Isn't it strange he had no cash when he started?

Mr. Seawell. That is our position.

The Court. And I want you to go into that. That goes to the starting point."

(R. Tr. p. 229, lines 10-33 to p. 230, lines 1-11.)

**II. A lucrative source of income has not been established.**

The revenue agent, testifying for the prosecution, stated that he made no adjustments in the amounts

reported by the defendant from the known sources of income, such as wages, partnership profits of the Capitola Liquor Store, sales of property, and possibly other transactions, for the years involved in this case. In effect, he reluctantly admitted that the defendant correctly reported all of his income from known sources. The agent stated that he did not know of any other sources of income, and, specifically, that he did not know about any gambling winnings of the defendant. No other witness has testified that the appellant had other sources of income, nor that the appellant received any substantial amount from gambling.

In view of the opening statement of counsel for the Government, and the attempted proof produced at the trial, the issue as to a lucrative source of income appears to be narrowed down to the single question as to whether or not the appellant was in receipt of gambling winnings during the years covered in the indictment.

Of course, the appellant did state in his purported statement, Trial Exhibit 7, that he did make money gambling, but he refused to sign this statement, for the reason that such statements were not the truth. He refuted these statements and declined to sign the document, both of his own accord, and upon advice of his counsel.

It is most sincerely urged by the appellant, and it is believed that an impartial appraisement of all of the evidence will reveal, that the appellant was not in receipt of gambling winnings during any of the years involved in this case.

The authorities are generally in accord with the proposition that in a net worth case, a lucrative source of income *must* be established, in addition to a satisfactory beginning net worth. The statement, commonly quoted as authority for this proposition, appears in *Gleckman v. U. S.* (C.C.A. 8, 1935), 80 F. 2d 394, p. 399, 16 A.F.T.R. 1425, p. 1430, as follows:

> "On the other hand, if it be shown that a man has a business or calling of a lucrative nature and is constantly, day by day and month by month, receiving moneys and depositing them to his account and checking against them for his own uses, there is most potent testimony that he has income, * * * We think there was in this case substantial circumstantial evidence that Mr. Gleckman did have a business outside of that described in his return and at least some of his deposits were derived from it."

The *Gleckman* case has been cited and approved by the Ninth Circuit Court of Appeals in the case of *Himmelfarb v. U. S.* (C.C.A. 9, 1949), 175 F. 2d 924, p. 949, 38 A.F.T.R. 145, p. 170, wherein the statement first above mentioned was quoted verbatim.

The *Gleckman* case has also been cited and approved in many other circuits, as follows:

*Rosenblum; U. S. v.* (C.C.A. 7), 176 F. 2d 329, 38 A.F.T.R. 327;

*Fenwick; U. S. v.* (C.C.A. 7), 177 F. 2d 490, 38 A.F.T.R. 1006;

*Kirsch v. U. S.* (C.C.A. 8), 174 F. 2d 595, 37 A.F.T.R. 1498.

At page 601 of this decision, the Court said: "It may be conceded here as it was in the Gleckman case, 80 F. 2d loc. cit. 399, 'that the bare fact, standing alone, that a man has deposited a sum of money in a bank would not prove that he owed income tax on the amount.'" The foregoing question need not now be determined, because there was other substantial evidence, heretofore noted, of income in excess of that reported.

*Venuta; U. S. v.* (C.C.A. 3), 182 F. 2d 521, 39 A.F.T.R. 540, p. 542.

While the decision in this case was reversed upon another ground, the Court noted: "Suffice it to say that this record contains evidence from which a jury could conclude beyond a reasonable doubt that during the prosecution years defendant had businesses of a lucrative nature, * * *"

*Carmack v. Comm.* (C.C.A. 5), 183 F. 2d 2, 39 A.F.T.R. 621;

*Graves v. U. S.* (C.C.A. 10), 191 F. 2d 582.

Throughout the numerous decisions involving the validity of convictions based upon net worth calculations, the question of a lucrative business or calling has always been relied upon. Every case called to our attention, in which the decision is affirmed, points to the fact of the existence of such a lucrative business or calling as at least one of the grounds upon which the affirmance is based.

*U. S. v. Johnson,* 319 U.S. 503, 63 S. Ct. 1233, 30 A.F.T.R. 1295, p. 1301.

In the instant case, if the premises heretofore stated are logically correct, the question to be "focused" upon is: Did the appellant receive gambling winnings during any of the years 1946, 1947, 1948 or 1949? There is no direct evidence in the record that he did. On the contrary, the revenue agent testified that he did not discover any evidence of gambling winnings. Mr. Gianelli, an intimate acquaintance and associate of the defendant, also testified that the defendant did not gamble. In view of this positive and direct testimony, it is respectfully submitted that there is no evidence to show that the defendant did receive gambling winnings.

Notwithstanding the trial Court's remarks above noted on the question of cash which appellant must have had on hand on January 1, 1946, in its memorandum opinion filed June 13, 1953 (R. Tr. p. 9, lines 24-27; R. Tr. p. 10, lines 1-32; R. Tr. p. 11, lines 1-32; R. Tr. p. 12, lines 1-20), the trial Court relied chiefly on *Remmer v. United States,* 205 Fed. 2d 277, stating:

> "* * * The defendant challenges the beginning net worth in that it makes no allowance for cash on hand by the defendant * * *"

The trial Court then went on to announce, in the usual terms that have been applied in these cases, namely, that there may be some question concerning the "mathematical exactness of the beginning net worth", and further that "this question has recently

been disposed of in the case of *Remmer v. United States".*

Attention of this Court is invited to the fact that certiorari has been granted in the *Remmer* case on one of the same issues presented before us in the case at bar. *Remmer v. United States,* ..... U.S. ....., 98 L. Ed. (Advance p. 81), November 16, 1953.

More recently, however, the case of *Calderon v. United States of America,* 207 Fed. 2d 377, was decided by this Court, which alone is sufficient authority to reverse the case at bar. In that case, this Court stated:

> "The burden of proof is on the prosecution as to each pertinent starting item of the net worth statements to a reasonable certainty. Absent, such a starting item as, say, cash on hand the remainder of the statement proves nothing. Here, there is no question as to the items 'cash in bank' as to each of the four years. * * * As to 'cash on hand,' that at the start of the accounting period, must be low enough to combine with the other factors to show a greater income than reported."

The Court went on to say:

> "The only other evidence showing the charged misstatements consists of Calderon's verbal statements to the tax officials and to his bookkeeper.
>
> A fortiori, since such written statements are extrajudicial, these verbal statements are. They cannot be the basis of a conviction absent, as here some independent proof of the corpus delicti"

and cited with approval:

*Bryan v. United States,* 175 Fed. 2d 223, 226 (Cir. 5);

*United States v. Fenwick,* 177 Fed. 2d 488 (Cir. 7);

*Guriepy v. United States,* 189 Fed. 2d 459, 463 (Cir. 6);

*Brodella v. United States,* 184 Fed. 2d 823, 825 (Cir. 6);

*United States v. Chapman,* 168 Fed. 2d 997, 1001 (Cir. 7);

*Pong Wing Quong v. United States,* 111 Fed. 2d 751 (Cir. 9).

It is submitted that the trial Court erred in relying on *U. S. v. Remmer,* not only for the reasons stated above, but also because in the *Remmer* case the Court set out the probable lucrative sources of income, which were as follows:

1. The B-R Smoke Shoppe.
2. The Day & Nite Cigar Store.
3. 110 Eddy Street.
4. The Menlo Club.
5. The 21 Club.
6. The San Diego Social Club.

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THE MOTION IN ARREST OF JUDGMENT.

It certainly cannot be said in this case that the appellant enjoyed a "speedy" trial as the term is

contemplated in the Sixth Amendment to the United States Constitution, and it cannot be said in this case that appellant in any way contributed to this delay. All the continuances and delays were not in any way occasioned by the appellant. Certainly, a year and two months from the beginning of a criminal trial lasting only twelve to fourteen hours, to the pronouncement of judgment, is utterly unfair and a denial of one's rights under our law from which all persons accused of crime should be spared.

*Ex parte Singer,* 284 Fed. 60 (1922);

*Ex parte Dellan* (C.C.A. 9), 1928, Calif., 26 Fed. 2d 243;

*Pratt v. U. S.* (1939), 102 Fed. 2d 275.

In *Pinkussohn v. U. S.* (7 C.C. 1937), 88 Fed. 2d 70, the Court stated as follows:

> "While we have no hesitancy in sustaining the sentence, we are somewhat at a loss to know why the case which was tried in November should not have been disposed of until May 4 of next year. The entry of a motion by accused for a finding of not guilty on the ground that the evidence was insufficient to support a conviction caused some postponement of action by the court, but it is hardly an excuse for the long delay that elapsed before the simple case with few or no legal questions involved, was disposed of * * *"

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## CONCLUSION.

It is submitted that there was no substantial evidence in the record in this case from which the Court

could infer that the appellant had received substantial income in the years 1946 and 1947 which he did not report in his income tax returns.

We are at a loss to determine why the Court granted appellant's motion for acquittal of counts four and five and not one, two or three. Is there any evidence in support of the first three counts which is not present in the latter two? As large expenditures were made insofar as counts four and five as there were insofar as counts one, two and three are concerned.

It is definitely established by the Government's own witnesses that appellant made no money at gambling. He had no source of income from which the alleged unreported income was derived. The beginning net worth was only guesswork, in view of the revenue agents' testimony that they had heard of appellant's affluence in prior years.

We further urge the Court that the motion in arrest of judgment should have been granted, and a reversal of the judgment should be based on this ground and all the others urged in this brief.

Dated, Stockton, California,
December 18, 1953.

Respectfully submitted,
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